SENJA CERAH SDN BHD A

v.

SISPROP SDN BHD;
TAN SRI CHENG HENG JEM & ORS (APPLICANTS) B

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN MOHD YUNUS J
[CIVIL SUIT NO: D1-22-955-2000]
18 AUGUST 2008 C

CIVIL PROCEDURE: *Subpoena - Setting aside - Application for - Materiality of witnesses for just decision of case - Whether proved - Whether issuance of subpoenas should be denied - Whether court satisfied subpoenas made bona fide - Whether an abuse of process - Whether application for setting aside should be dismissed* D

The defendant herein applied to this court for subpoenas to be issued to the following persons to be witnesses for the defence at the trial: (a) Tan Sri William Cheng Heng Jem; (ii) Cheng Yong Liang; (iii) Charoen Sae Tang. The subpoenas have been issued and served on the above three persons ('the applicants'). The plaintiff company and the applicants, by summons in chambers at encls. 27, 31 and 39, applied to this court to set aside the subpoenas. Briefly, the facts were that by a loan agreement and a variation agreement, the plaintiff company had given the defendant company a loan of RM500,000 which was to be repaid within three months from the date of the issuance of the Certificate of Practical Completion in respect of the defendant's unit entitlement under a project ('the project'). The dispute between the parties was the nature of the loan. The plaintiff claimed that they had granted the defendant a friendly loan of the said sum, meaning that the loan was interest free. The plaintiff alleged that the defendant had defaulted in the repayment of the loan, and hence the plaintiff filed the present writ action against the defendant claiming the said sum of RM500,000. The defendant, on the other hand, alleged that the loan was not a friendly loan and that the plaintiff had charged interest and had in fact collected interests from the defendant in contravention of the Moneylenders Act 1951. The defendant also filed a counter claim, alleging defective construction of 23 units of shophouses/apartments in the said project. Hence, the defendant was claiming RM19 million for the defective E F G H I

A construction as well as for loss of rental and property value. The applicants herein submitted the grounds for the setting aside of the subpoenas (i) that the applicants were not personally involved in the matters in issue and would not be in a position to assist the court to give any evidence which were relevant and material
B in relation to the claim and/or counterclaim; (ii) that the subpoenas were not bona *fide* for obtaining relevant evidence, were oppressive, were for the purpose of annoyance or in spite, and were for improper motives.

C **Held (dismissing the three applications with costs):**

(1) The defendant had succeeded in showing the materiality of the three witnesses for the just decision of the case. It was not disputed by the applicant Tan Sri William Cheng that the loan
D of RM500,000 was released by the plaintiff to the defendant, and that the cheques were signed by Tan Sri William Cheng himself. The defendant's line of defence was that if the defendant succeeded in showing to the court (i) that interest was in fact charged by the plaintiff for the loan to the
E defendant and (ii) that the four payments amounting to RM15,833,32 were in fact payments of interests, then the defendant would submit that was stated in the loan agreement (to the effect that it was a friendly loan) and at para. 8 of the statement of claim (that the payments amounting to
F RM15,833,32 were payments towards settling the principal sum only) were false, and that the lending transaction was in reality an illegal transaction as it contravened the Moneylenders Act 1951. Tan Sri William Cheng, undoubtedly, was a material witness for the defence. In relation to the
G defendant's counterclaim, the defendant required Tan Sri William Cheng and his nephew Cheng Yong Liang to produce the architect's report and to confirm that there were serious defects. The attendance of Tan Sri William Cheng and his nephew in court would greatly assist the defendant towards
H proving their counterclaim. There was merit in the defendant's contention that Tan Sri William Cheng and his nephew Cheng Yong Lian were material witnesses for the defence. As to the relevance of the third applicant, Charoen Sae Tang admitted that his legal firm had prepared the loan agreement. Chareon
I was a material witness for the defence. (paras 23, 24, 27, 28, 29, 30 & 31)

(2) At the stage of this proceeding, the defendant should not be denied the issuance of the subpoenas just because of the applicants' denials; nor does this court in the present inquiry need to be convinced of the truth of the averments in the defendants' affidavits on a balance of probabilities, in deciding whether or not the subpoenas ought to be set aside. This court was satisfied that the applications for the subpoenas were made *bona fide*, that there was some credibility in the defendant's affidavit evidence in relation to the materiality of the proposed witnesses, and that triable issues have been raised by the defendant by their affidavits. This court ought not as a matter of law set aside the subpoenas that had already been issued and served. There was no abuse of process here on the part of the defendant in applying for the issuance of the subpoenas. There was also no intention on the part of the defendant to embarrass or to oppress the three applicants. (paras 32 & 33)

Case(s) referred to:
Wong Sin Chong & Anor v. Bhagwan Singh & Anor [1993] 4 CLJ 345 SC ***(refd)***

For the plaintiff - WM Chong; M/s Raja, Darryl & Loh
For the 6th defendant - George Proctor; M/s YS Woo & Proctor

Reported by Suhainah Wahiduddin

JUDGMENT

Hishamudin Mohd Yunus J

[1] The trial of this case is scheduled to be held on 1, 2, 3 and 4 December 2008. The defendant has applied to this Court for subpoenas to be issued to the following persons to be witnesses for the defence at the trial. They are:

(a) Tan Sri William Cheng Heng Jem;

(b) Encik Cheng Yong Liang; and

(c) Encik Charoen Sae Tang.

[2] The subpoenas have been issued and served on the above three persons (hereinafter shall be referred to as the 'applicants').

[3] The plaintiff and the above three applicants now, by summons in chambers at encls. 27, 31 and 39, apply to this court to set aside the subpoenas.

[4] There is also an alternative prayer that the applicants be permitted to give their evidence only after the defendant's principal witness has given evidence.

[5] In their statement of claim, the plaintiff claims against the defendant a sum of RM500,000, which the plaintiff had lent to the defendant.

[6] Tan Sri William Cheng is not a director, officer or shareholder of the plaintiff company. However, it is not disputed that the plaintiff company is directly or indirectly controlled by Tan Sri William Cheng and his family members.

[7] It is not disputed that by a loan agreement dated 7 April 1990 and a variation agreement dated 12 July 1994, the plaintiff company gave the defendant company a loan of RM500,000 which was to be repaid within three months from the date of the issuance of the Certificate of Practical Completion in respect of the defendant's unit entitlement under a project known as Wangsa Intan Klang II & III (hereinafter shall be referred to as 'the project').

[8] What is in dispute between the parties is the nature of the loan. The plaintiff claims that they had granted the defendant a friendly loan of RM500,000, meaning that the loan was interest free. The defendant, on the other hand, alleges that the loan was not a friendly loan and that the plaintiff had charged interest and had in fact collected interests from the defendant in contravention of the Moneylenders Act 1951.

[9] The plaintiff alleges that the defendant had defaulted in the repayment of the loan, and hence the plaintiff filed the present writ action against the defendant claiming the sum of RM500,000.

[10] The defendant in their statement of defence alleges, *inter alia:*

(a) that the plaintiff is an unlicensed money lender and that the defendant had been charged interest by the plaintiff on four occasions, which interest had been paid by the defendant; and

(b) that the plaintiff is not entitled to recover the loan from the defendant as the loan transaction was illegal as being in contravention of the Moneylenders Act 1951.

[11] The defendant also has a counter-claim against the plaintiff, and this counter-claim is for damages in respect of defective works. In order to appreciate the counter-claim, one needs to know some more background facts. It is not disputed that the defendant entered into a joint venture agreement with the plaintiff way back in 1988 to develop five pieces of land in the project mentioned earlier. The five pieces of land belonged to the defendant and two other co-owners. Under the joint venture agreement, the plaintiff company is the developer of the project. Under the joint venture, the defendant and the other co-owners are entitled to 20 percent of the units constructed. The plaintiff, however, delayed the construction until 1994. The RM500,000 loan granted to the defendant by the plaintiff (as mentioned earlier) is somehow linked to this delay on the part of the plaintiff in completing the project, and I do not propose to go into the details.

[12] It is also not disputed that the units in the project were constructed in a defective manner and are sinking.

[13] In the counter-claim, the defendant is alleging defective construction of 23 units of shophouses/apartments in the said project. Hence, the defendant is claiming RM19 million for the defective construction as well as for loss of rental and property value.

[14] Reverting to the applications that are now before me, the grounds for the setting aside of the subpoenas are, *inter alia*:

(a) that the applicants are not personally involved in the matters in issue and will not be in a position to assist the court to give any evidence which are relevant and material in relation to the claim and/or counterclaim; and

(b) that the subpoenas are not *bona fide* for obtaining relevant evidence, are oppresive, are for the purpose of annoyance or in spite, and are for improper motives.

[15] I have dismissed the three applications with costs and I shall now give my grounds.

[16] In a setting aside (of a subpoena) application, the basic principle is as enunciated by the Supreme Court in *Wong Sin Chong & Anor v. Bhagwan Singh & Anor* [1993] 4 CLJ 345. In this case cited, Mohamed Azmi SCJ, in delivering the judgment of the Supreme Court, said:

> In every case, the onus is on the party issuing the subpoena to show the materiality of the witness for the just decision of the case, in that it outweighs any oppression that may be caused to the party objecting.

[17] In the present case I am satisfied that the defendant has succeeded in showing the materiality of the three witnesses for the just decision of the case.

[18] In this judgment, in dealing with the issues pertaining to the applications to set aside the subpoenas, I shall try to avoid touching on the merits of the claim or defence of either sides in respect of the main action and the counter-claim. These are matters to be determined at the trial.

[19] It is not disputed by the applicant Tan Sri William Cheng that the loan of RM500,000 was released by the plaintiff to the defendant in five instalments, and that the five cheques were signed by Tan Sri William Cheng himself.

[20] It is alleged by the defendant, by way of the affidavit evidence of one Mr. Lim Chong Lai, the general manager of the defendant company, that he (Mr. Lim Chong Lai) had negotiated with Tan Sri William Cheng for the said loan and that the plaintiff initially was reluctant to give the loan as the plaintiff was having financial difficullties. It is further alleged by Lim that after various meetings with Tan Sri William Cheng the latter agreed to give the defendant a loan of RM500,000 but the plaintiff would have to charge interest. I do, however, note that Tan Sri Cheng has denied these allegations; but these are matters to be trashed out at the trial.

[21] The plaintiff in their statement of claim maintains that the loan was a friendly loan and that no interest was charged. With regard to a series of payments amounting to a sum of

RM15,833.32 made by the defendant to the plaintiff, the plaintiff maintains that these were payments made towards settling the principal sum, and not towards payments of interests.

[22] The defendant in their affidavit explains that they have subpoenaed Tan Sri William Cheng to elicit evidence from him to the effect that, although the loan agreement states that the loan was a friendly loan (this facts is not disputed), in actual fact interest was charged.

[23] The defendant's line of defence is this: if the defendant succeeds in showing to the court:

(i) that interest was in fact charged by the plaintiff for the loan to the defendant; and

(ii) that the four payments amounting to RM15,833.32 are in fact payments of interests,

then the defendant will submit that what is stated in the loan agreement (to the effect that it was a friendly loan) and at para 8 of the statement of claim (that the payments amounting to RM15,833,32 are payments towards settling the principal sum only) are false, and that the lending transaction was in reality an illegal transaction as it contravened the Moneylenders Act 1951.

[24] In my judgment, in the light of the above facts and allegations, and in the light of the defendant's line of defence, Tan Sri William Cheng, undoubtedly, is a material witness for the defence.

[25] However, there is another reason as to why the defence contends that Tan Sri William Cheng is a material witness. This relates to the defendant's counter-claim against the plaintiff. My deliberations on the counter-claim will also explain as to why Mr. Cheng Yong Liang is also a material witness for the defence.

[26] It is further alleged that after numerous complaints to the plaintiff that the units had been constructed in a defective manner and that a false certificate of practical completion had been issued, a meeting was arranged somewhere in early 1999 with Tan Sri William Cheng at his office where Lim voiced his grievances. Lim further alleges in his affidavit that Tan Sri William Cheng then

instructed his nephew, Mr. Cheng Yong Liang (that Cheng Yong Liang is the nephew of Tan Sri William Cheng is not disputed) to arrange for an architect to assess the defective works and to rectify the same upon obtaining the architect's report. It is alleged by the defendant that a joint inspection was held but to date the plaintiff have refused to reveal whether the architect has prepared a report on the defects and the sinking and the cost of remedial works.

[27] The defendant requires Tan Sri William Cheng and his nephew Cheng Yong Liang to produce the architect's report and to confirm that there are serious defects and sinking. The defendant contends that the attendance of Tan Sri William Cheng and his nephew in court will greatly assist the defendant towards proving their counter-claim.

[28] By reason of the issue raised, the allegations by Lim in his affidavits, and the purpose of calling Tan Sri William Cheng and his nephew to testify, as explained by the defendant in their affidavits, I am of the opinion that there is merit in the defendant's contention that Tan Sri William Cheng and his nephew Cheng Yong Liang are material witnesses for the defence.

[29] As to the relevance of the third applicant, Encik Charoen Sae Tang, as a witness for the defence, it is alleged by the defendant, by the affidavit evidence of Mr. Lim Chong Lai, that Encik Chareon's legal firm by the name of Messrs C. S. Tang and Co. firm prepared the loan agreement; that Lim met Chareon in his (Chareon's) office prior to signing the loan agreement and was told by Chareon that he (Lim) had to sign a 'friendly' loan agreement as it was illegal for the plaintiff to charge interest; that Lim signed a loan agreement for a loan of RM500,000 and that it was stated in the agreement that the RM500,000 loan was a friendly loan.

[30] Chareon in his affidavit admits that his firm prepared the loan agreement. However, he denies the other allegations.

[31] In my view, in the light of Lim's allegations by affidavit evidence regarding what Chareon had told him about the interests, Chareon is a material witness for the defence.

[32] It is, however, true that all the three applicants, namely, Tan Sri William Cheng, Cheng Yong Liang and Chareon, in their respective affidavits have denied the allegations made by the defendant in their affidavits. But as to whose evidence is to be accepted, this is a matter to be determined at the trial. I do not think that it is the law that I must at this stage of the proceeding deny the defendant the issuance of the subpoenas just because of the applicants' denials; nor do I in the present inquiry need to be convinced of the truth of the averments in the defendant's affidavits on a balance of probabilities, in deciding whether or not I ought to set aside the subpoenas. As long as I am satisfied – and it is the case here – that the applications for the subpoenas are made *bona fide*, that there is some credibility in the defendant's affidavit evidence in relation to the materiality of the proposed witnesses, and that triable issues have been raised by the defendant by their affidavits, I ought not as a matter of law set aside the subpoenas that had already been issued and served.

[33] In conclusion, I hold that there is no abuse of process here on the part of the defendant in applying for the issuance of the subpoenas. There is also no intention on the part of the defendant to embarass or to oppress the three applicants. (I do not propose to deal with the applicants' alternative prayer as this prayer is not addresssed by the applicants either in the affidavits or in the submissions.)

[Applications dismissed with costs.]